United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2255

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For the Second Circuit.

In the Matter of the Arbitration between
INTSEN CORPORATION,
Petitioner-Appellee,

-against-

M.W. ZACK METAL COMPANY,
Respondent-Appellant.

APPELLANT'S REPLY BRIEF

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REPLY BRIEF

24-2255

QUESTION INVOLVED

Has respondent met the reasons for vacating the award advanced by appellant? The answer is "no". Respondent's brief fails to justify the district court's action in refusing to review the documentary evidence that was before the arbitrator and the principle that a district court must examine the facts when a charge is made under Section 10 of the Arbitration Act that the arbitrator had exceeded his powers. Also, the respondent's brief fails to meet the appellant's factual charge that the contents of the documents proved that there were no issues in dispute and that the powers of the arbitrator had been unequivocally terminated by agreement of the parties.

For these reasons, respondent's arguments only

confuse these issues and should not be allowed to avert a vacation of an unlawful award.

a. Was the January 1969 contract terminated or was it not?

The inquiry into this point will disclose that the January 1969 contract was terminated; that the award was based upon this terminated contract; that that was an error by the arbitrator, and that that error was continued by the district court.

The facts of that contract and of its performance were before the arbitrator unopposed. All agree that the agreement consisted of Zack's purchase order of January 7, 1974, (Schwartz's Exhibit G, p. 76) and Intsel's mill confirmation of January 13, 1969 sent to Zack (p. 64). To digress is necessary so as to explain Intsel's form of "confirmation." Intsel purchased what it sold Zack from its mill in France and confirmed its purchase on a form identical with its confirmation of sale to Zack, except for price and certain pertinent information relating to shipping instructions to its mill. Intsel has been here using its confirmation to its mill unlawfully by using it as the confirmation to its customer. Yet, its sole witness, Fifield, testified that the confirmation to the mill was not sent to Zack and was not binding on Zack (pp. 15, 20, 24, 27, 39, 40 and 80). The confirmation sent to Zack

has the legend "Mill Confirmation" on its face, and shows that the prices Intsel had agreed to pay its mill was blocked out. See for example Zack's Exhibit 3, p. 51 and Zack's Exhibit 6, p. 100. Compare respondent's Exhibit A, p. 7; and Exhibit B, p. 8. The latter are the forms Intsel would send to their mill in France (p. 40, 42). The legend "Sales and Purchase Contract" on this form is confusing, until the prices are read. They are the charges of the mill to Intsel and not Intsel's charges to its customer. Intsel's confirmation of sale to Zack was placed into evidence before the arbitrator but it was not physically offered to the district court but it was referred to in the papers. All parties agreed that the mill confirmation sent to Zack was before the arbitrator.

This January contract by its own terms calls for the purchase of 40,000 lbs. of aluminum tubing by specification. It was conceded before the arbitrator that a sample of the tubing was later obtained to guide the mill in the manufacture of the article and that the contract was modified to manufacture a trial order of 10,000 lbs. Intsel issued its writing dated March 14, 1969 confirming it but it was not put into evidence because all parties conceded that modification. It was nevertheless offered by Intsel, handed up to the arbitrator, conceded by Zack

and it was withdrawn.(pp. 15, 24, 41 and 91). The trial order of 10,000 lbs. was satisfactory and paid for.

The June contract for 55,000 lbs. followed. It is conceded that this contract consists of Zack's purchase order of June 18, 1969 (Zack's Exhibit 2, p. 50, and Intsel's mill certificate of June 23, 1969, Zack's Exhibit 3, p. 51). Its terms clearly state a sale of 55,000 lbs. of tubing with shipment of the first 15,000 lbs. mentioned to be made as soon as possible and the remaining 40,000 lbs. to be delivered at Detroit in September.

The terms of Intsel's confirmation stated that the January contract was terminated. Appellant said about the specifications of the items of the January contract in this mill certificate of June 23, 1969 that the January contract was superseded by the June contract. The respondent says that there was only a modification of the January contract by the June contract (see pp. 4-5.14 of its brief). Whether superseded or modified, the changes wrought appear in Intsel's own writing offered to the arbitrator and to the court below, viz; the mill confirmation of June 23, 1969 (Zack's Ex. 3, p. 51). The modification goes all the way to say that the 40,000 lbs. ordered under the January contract, viz; item 1 (10,000 lbs.) (see Ex. A, p. 7) were cancelled; item 2 (10,000

lbs.) was increased to 15[illegible]. and included in the June contract; item 3 (10,000 lbs.) was shipped; and item 4 (10,000 lbs.) was canncelled. Thus the modification terms effectuated a legal termination of the January contract. Intsel intended to establish its non-liability for the 30,000 lbs. of the January order remaining unfulfilled by the delivery of 10,000 lbs. delivered in April 1969; it succeeded very well.

Intsel continues to claim the modification by claiming that its file number of 50,240 was assigned to both purchases. This number, it says, shows that there was only a modification. Obviously, one party's file number cannot unilaterally change the plain terms of the writings of the parties. Why does Intsel overlook the legal consequences of termination and insists upon calling the June contract a modification? Because the arbitrator had not correctly assessed the legal correlation between the June and January purchases but wanting to award in favor of Intsel, awarded under the January contract. To avoid the legal consequences of this gross error of the arbitrator, respondent raises a lot of dust about the usefulness of arbitration, about the necessity of attaining speedy decisions, about the prerogatives of the arbitrators and it would claim a distinction between the words "superseded" and "modified" which doesn't exist.

The fact is that the arbitrator awarded on a terminated contract under which there was no dispute.

Also, Intsel's Exhibit A, concededly, is not the January contract despite Intsel's claims in the Federal Court. Intsel is offering it as the contract but the conceded facts show that it was admitted in the arbitration proceedings that it was its confirmation of purchase to its mill, see pp. 15, 20, 24, 27, 39 and 49). The court below, nevertheless, treated it as the contract. Nor was the documentary evidence to the contrary, but on its own face Exhibit A is not signed by Zack, it is not addressed to Zack and the message talks to Intsel's mill confirming its purchase from its mill. Note that the list of prices is not blocked out and that they are lower than the sales price to Zack of $.503 per lb. (p. 64). The allegations of Intsel in its petition to the Federal court that Exhibit A is the contract is open to the defense of the Statute of Frauds because it is not signed by Zack and it is not a confirmation of sale sent to Zack. The court below excused it as the latter overlooking the conceded fact by Fifield that it was never sent to Zack. This point about the Statute of Frauds was not restated in appellant's main brief because it is less important to talk about the form of the contract when the whole of it is terminated by the consent of the parties.

The court below refused to examine the documents placed into evidence by the arbitrator asserting that their interpretation was for the arbitrator. When, however, the arbitrator's alleged interpretations ignore the plain wording of the documents and the losing party is asserting that the arbitrator has exceeded his powers and the award results in an unnatural reading of the contracts and in a rewriting of the contracts, the record must be examined. The loser's rights under Section 10 of the Arbitration Act intervene. Those rights create a cause of action. It would rest upon the facts occurring at the arbitration.

The arbitrator said that he would not take stenographic notes of the oral evidence (pp. 13-14). The only proof of what was before the arbitrator other than the claims of the parties in the affidavits before the district court, would be the documentary exhibits marked by the arbitrator, and the facts conceded before the district court. The termination of the January contract being evidenced by Intsel's own writing that is in evidence unopposed is a conceded fact. The district court erred when it refused to consider this evidence and refused Zack a trial, see the demand for a trial at p. 34.

b. The breach, cancellation and termination of the June contract for the tubing and the July-August contract for the bars.

Intsel claims that the arbitrator's findings of facts on the performance or not of these two contracts cannot be reviewed. But, before that point is reached, there must be disputed facts about the performance or termination of such contracts. Otherwise, a decision

when there is no dispute is an excess of power. If there are no disputes the arbitrator has nothing to settle. The best proof of the fact that there are no disputes is if the facts of performance are conceded or admitted or not controverted.

Appellant claims that that is the case. The June contract is evidence by Zack's Exhibits 2 and 3 and the July-August contracts by Zack's exhibits 4 and 6. These are conceded. It is also conceded that delivery is stipulated for September at Detroit.

Also, there is no dispute that Zack made these purchases to supply a customer, Fox Manufacturing Co. of Detroit, under a back-to-back contract. Also, it was conceded by Fifield that under these contracts time was of the essence.

Performance by Intsel under these two contracts was alike, none. The conceded fact is that no delivery was made as stipulated. The uncontradicted evidence is that when it became apparent that Intsel could not get a shipping date from its mill late in September, even the 15,000 lbs. promised to be shipped as soon as possible, had not been shipped, Fox cancelled his contract with Zack and covered elsewhere, and Zack told Intsel it had to cancel its contracts with them, too; and did. Thus, no obligation arose to bind Zack for the purchase price.

Why then was there an award of the contract price? Intsel had breached and Zack had cancelled and the contracts were ended and these facts are conceded or uncontroverted.

Respondent has never denied that Krasnov had cancelled the contract on September 26, 1969. Not even in its brief to this court, nor in its papers to the district court did it claim that Krasnov had not testified and recited the many conversations he had had with Mernick of Intsel and told of how he had bought the material, had provided the sample, reported it satifactory, and purchased the larger quantity in June. Then he made the inquiries about shipments and finally, in September extended himself to seek fulfillment of the contract by Intsel and when Intsel could not deliver, he cancelled. Instead, Intsel lays claim to a delivery and acceptance, but it showed no proof of it. No receipt for the material by Zack was shown. The only witness for Intsel, Fifield was by his own admission incompetent to say and did not make the claim. No document of ar[illegible]nd was produced in support of such a claim. The truth is that there was never any acceptance of the late delivery or a modification of the contract to permit the late delivery. Intsel relied only on the fact that Zack had the goods on hand at the time of the arbitration. Yet, their Mr. Besso who

was charged by Mr. Zack with having pressed him to agree to take the goods on the understanding that they should be sold for Intsel's account, did not come to the hearing and deny the charge. This is conclusive proof that Zack had no obligation to pay for the material. There was no dispute about this fact before the arbitrator. Yet, he ignored it. The district court ignored it. An award made in the face of such a fact is an excess of power not a decision on a disputed issue of fact. A novation according to New York's U.C.C. 2.604 had occurred. If credibility was in doubt, a serious issue would be before the court below. It spelled the difference between the arbitrator having and not having any power to decide anything but the ultimate fact that his powers under the writings had ended. This is an issue that should have been tried and it was error not to have had a trial.

c. Respondent's failure to deny the facts claimed by appellant to be uncontradicted conceded or admitted.

Without first stating what evidence appellant claimed was contradicted, conceded or admitted, respondent reverts to generalities and confusion. At pp. 15-16 of its brief, it addresses itself only to the claims of "undisputed or conceded" facts. It does not say what the facts are; but it says that they were "vigorously opposed"

before the arbitrator. Then it says, of course, "those issues of fact were for the arbitrator...." Thus it dispoed of conceded or admitted facts without stating what facts it is talking about and at the same time it calls them issues of fact. Nor did Intsel contradict, in the District Court, the facts proved by the admitted, conceded and uncontroverted evidence before the arbitrator. Respondent in its brief does say at p. 7 that the uncontradicted facts were "vigorously disputed by Intsel and were contradicted by documentary evidence." Who for Intsel vigorously disputed these facts and what documents contradicted them, Intsel does not say. It cannot say as no one testified for Intsel except Mr. Fifield who had no personal knowledge of the facts. Nor are there any documents submitted or even named which are supposed to do the contradicting. There are no such documents.

Here are general denials of facts specifically proven by appellant and even if such denials could raise an issue of fact, the district court should have ordered a trial. The court erred in failing to understand the legal implication of these claimed uncontradicted facts and in not holding a trial on the question of whether the facts were or were not contradicted before the arbitrator. If the district court had assumed the truth of

the fact claimed by appellant it could very well have found for appellant as the general denials of the respondent do not raise a bona fide issue for trial. As it is, the district court has favored the general denials of the respondent over the positive statement of facts of the appellant supported by the late arrival of the ships bearing the goods, Intsel's own shipping documents, and Intsel's billing of March 31, 1971, which effectively says that when the transfer of possession had occurred, no bills for the purchase price were issued. The fact of non-payment and possession of the goods confirm the novation that took place.

d. What happened to the obligation of the arbitrator to apply New York law to the contract?

Nothing is stated by Intsel about appellant's specifications of the manner in which the arbitrator failed to apply New York law to the facts before him. Instead, it talks about the New York law applicable to the conduct of arbitrators at pp. 14-15 and it recites rules of the American Arbitration Association about arbitrators being the sole judges of evidence (p. 19) and at p. 11, it claims that arbitrators may grant any relief they may deem just and equitable within the scope of the agreement of the parties; but respondent's claim at page 11 is indicative of its erroneous thinking. It

has emphasized "any relief they deem just and equitable" and it has lost sight of the words "within the scope of the agreement of the parties". It wants to overlook the fact that the terms of the contract appointing the arbitrator is the limit of his power. The provision that the parties' rights under the contract shall be construed by New York law does not grant him the right to apply his own version of New York law. New York law is a body of laws that can be found in books. That is the measure of the law to use to adjust the rights of the parties in the case where the arbitrator is commanded to apply New York law to the dispute.

Nothing is said of this by Intsel. It cannot say anything. New York law was transgressed by the arbitrator in the many ways stated in appellant's brief.

In the same vein, Intsel has failed to show that the principle that the district court must review the record before the arbitrator when his award is attacked for being in excess of his powers is not denied, nor is its application as made by appellant shown to be inappropriate. Nor, is the fact that Intsel's documents and the existence of uncontroverted evidence positively showing facts making the award an irrational one under New York law shown to be incorrect.

Instead, Intsel's claims to the arbitrator having the power to find the facts and the law without also

showing that there were disputed facts for the arbitrator to operate on is patently incorrect. It covers up its mistaken notion of law with glib name calling and with misquotations and the misinterpretations of cases does not save its arguments. Nor do they impel acceptance of a situation where the minimum safeguard of a constitutional guarantee of a fair hearing are denied appellants.

WHEREFORE, this court is respectfully requested to reverse the order of the district court, to vacate the award and if it must refer the matter to arbitration again, then to direct that the hearing be had before a different arbitrator. On the other hand, it is submitted that the same conceded, admitted and uncontroverted facts show, as a matter of law, that appellant should be awarded at least a dismissal of the demand for arbitration, if not the damages for the failure to deliver as asked for in its counterclaim with costs in all proceedings had.

Respectfully submitted,

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TAILDO INTSEL REP BF.

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 23 day of December , 1974 deponent served the within brief upon WEIL, GOTSHAL & MANGES

attorney(s) for appellee

in this action, at 767 5th Ave., NYC 10022

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
23 day of December, 1974

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976